No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF JUSTHEIM PETROLEUM COMPANY AS AMICUS CURIAE

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Justheim Petroleum Company ("Justheim") is an applicant for State of Utah oil shale lease of lands which are the subject of the state selection applications here under review. Justheim was granted leave to file amicus brief by the Tenth Circuit and submitted an amicus brief to this Court in opposition to grant of certiorari. Justheim files this brief in support of the State of Utah's position.

QUESTIONS PRESENTED

The Secretary has, in his brief on the merits as well as in his petition for certiorari, isolated the Taylor Grazing Act (the "Act") as the sole source of his purported authority to substitute a "value for value" criterion (or any other he may choose to adopt) for the "acre for acre" criterion clearly established by Utah's enabling act as the basis for indemnity selection.

The central issue is whether Congress, by the Act, conferred on the Secretary an authority to effect a de facto repeal of the indemnity selection provisions of the western state enabling acts.

No Secretary publicly betrayed any disposition to interpret the Act to confer such authority until February 14, 1974, nearly half a century after the Act's passage and fifteen years after Congress authorized state acquisition of mineral interests as a part of the indemnification process. Nevertheless, the Secretary now claims that his Act-derived authority to place public lands in grazing districts constitutes plenary power to remove those lands from state selection availability and maintain them in that status until he chooses to classify them as "proper for (state) acquisition" by standards of his own invention.

Our purpose in this brief is to review the fundamentals of statutory construction as they relate to the legislation here relevant. The Secretary so steadfastly directs the Court's attention to *secondary* sources that *primary* sources of enlightenment as to Congressional intent may be overlooked.

ARGUMENT

POINT I

THE TAYLOR GRAZING ACT PROVIDES NO FOUNDATION FOR THE SECRETARY'S CLAIMED POWER

It cannot be contested that the one purpose of the Act was to protect and refoliate the public range. No objective reading of it permits the conclusion that the evil sought to be purged was state abuse of selection machinery. On the contrary, the

Congress carefully protected the states from the threat of Secretarial domination. Consider this language from the 1934 Act:

> "Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has heretofore initiated under existing law validly affecting the public lands . . . nor to affect any land heretofore or hereafter surveyed which, except for this chapter, would be a part of any grant to any State, nor as limiting the power of authority of any State as to matters within its jurisdiction."

To defeat the Secretary's claim, a better proviso could scarcely have been designed. These observations are particularly relevant:

A. Utah indemnity selection right is among those protected from impairment.

There can be little question that Utah's indemnity selection right is one "initiated under the existing law" within the meaning of the quoted language. The right was not only *initiated under* existing law, it was *conferred by* existing law. Moreover, Utah's rights in federal land were in no sense inchoate; the rights in land to be selected vested at statehood. The enabling act is not a mere promise to indemnify, it is an in praesenti conveyance of rights in land. It conveys the lands necessary to satisfy indemnity requirements in the same sentence and by the same granting clause as it conveys school sections.[1]

B. The lands Utah has undertaken to select are among those beyond the Secretary's power to "affect" in the exercise of his authority under the Act.

The Act protects from change in status any lands which "would be a part of any grant to any state". All unappropriated public domain in Utah falls in that category, for all unappropriated public domain is subject to selection under the enabling act grant. The Secretary's placement of lands in a grazing district cannot operate as a withdrawal or have adverse affect on a state's rights therein.

[1]A deed conveying such five acres of Blackacre as the grantee may select is a perfectly valid deed (see discussion at 23 Am.Jur.2d 265, Deeds § § 222, *et seq.*) and its validity is not impaired if the selection is confined to acreage not improved at the time of the grantee's selection. Such a deed operates as a conveyance of an undivided interest in Blackacre (*Fisher v. Weilchua*, 16 Hawaii 154; *Hodge v. Bennett*, 78 Miss. 868, 29 So. 766; *Sequin v. Malomey*, 198 Ore. 272, 253 P.2d 252, 258 P.2d. 514), the grantee having the right to terminate the contenancy by exercising the right of selection (*Smith v. Furbish*, 68 NH 123, 44 A. 398).

POINT II

UTAH'S ENABLING ACT PROVIDES NO FOUNDATION FOR THE SECRETARY'S CLAIMED POWER.

Utah's enabling act provides that lands to satisfy indemnity rights "are hereby granted . . . to be selected in such manner as the legislature may provide, with the approval of the Secretary of the Interior." Whatever question there might have been as to the nature of necessary Secretarial "approval" was answered in 1921. As the Secretary concedes at page 29 of his brief, this Court, in *Wyoming v. United States,* 255 U.S. 489 (and less clearly in *Payne v. New Mexico,* 255 U.S. 367) held that the Secretary's function in the selection process is ministerial and not discretionary. The enabling act was construed, just as the Tenth Circuit construed it, to cast upon the Secretary the duty of ascertaining (1) whether the base lands were in fact lost by federal appropriation before the event (statehood or survey) which would otherwise have transferred their ownership to the state, and (2) whether the lands sought to be selected were, as of the date of selection, open public domain, and "of approving or rejecting the application accordingly".

POINT III

THE INDEMNITY SELECTION STATUTES PROVIDE NO FOUNDATION FOR THE SECRETARY'S CLAIMED POWER.

Sections 43 U.S.C. 851-852 (Act of August 27, 1958, 72 Stat, 928) put to rest any questions about whether the Secretary's placement of lands in grazing districts consituted a federal appropriation precluding their selection. For, in those sections, Congress declares that lands of acreage equal to the acreage of lost lands are "appropriated" for indemnification purposes. The sections, as reenacted in 1958, again identify the kinds of federal action which remove federal lands from eligibility for selection. Placement in grazing districts is not one of the identified kinds of action. The original statute (as codified Act of February 28, 1891) also "appropriated" public lands for indemnification. The 1958 reenactment would have been a futile gesture if the entire public domain had already been preempted by the Secretary.

POINT IV

THE SECRETARY URGES CONSIDERATION OF MATERIALS WHICH ARE NOT PART OF LEGISLATIVE HISTORY AND SHOULD NOT INFLUENCE CONSTRUCTION OF STATUTES WHICH PRESENT NO AMBIGUITY.

In its brief in opposition to the Secretary's Petition for Certiorari, Justheim addressed this point at some length. The materials the Secretary views as administrative interpretations of statute have been largely in-house memoranda which were given no public circulation and whose content was inconsistent with decades of departmental practice. The materials he views as reflective of Congressional attitudes are mere statements of individual members of Congress. We refer the Court to Justheim's earlier brief and submit that the materials in question are not worthy of consideration as a source of insight to legislative intent.

Respectfully submitted this 9th day of October, 1979.

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